FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 12 1960
JAMES R. BROWNING, Clerk

No. 651

In the Supreme Court of the United States

OCTOBER TERM, 1959

KENNETH JOHN BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney, Department of Justice,
Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	5

CITATIONS

Statute and rule:	
18 U.S.C. 2314	2
Rule 30, F. R. Crim. P	4

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 651

KENNETH JOHN BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 11–13) is reported at 271 F. 2d 775.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1959. A petition for rehearing was denied on December 21, 1959 (Pet. 15).[1] On January 14, 1960, Mr. Justice Black extended the time to file a petition for a writ of certiorari to February 19, 1960. The petition for a writ of certiorari was filed January 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Leave to file a second petition for rehearing was denied on January 13, 1960 (Pet. 16).

QUESTION PRESENTED

Whether the instructions to the jury, to which there was no objection at the trial, were so defective as to be subject to attack after affirmance of the judgment by the Court of Appeals.

STATUTE INVOLVED

18 U.S.C. 2314 provides in pertinent part:

* * * * *

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited * * *
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * * *

STATEMENT

In the United States District Court for the Southern District of Florida, petitioner was convicted on one count charging a violation of 18 U.S.C. 2314 by the transportation of a false security in interstate commerce. He was sentenced to imprisonment for three years (R. 5–6).

The information (indictment having been waived, see R. 12–14) charged that on or about February 21, 1957, the petitioner, alias Irving Rubin, "did cause to be transported in interstate commerce a falsely made and forged security, to wit: Exchange National Bank of New York Traveler's Check bearing #197 in the amount of $50.00, signed and countersigned 'Irving

Rubin', with an unlawful and fraudulent intent, knowing the same to have been falsely made and forged" (R. 1). The evidence showed that there is no Exchange National Bank of New York (R. 74–78). Petitioner had cashed the check in a Florida supermarket (R. 8–10). He had also cashed a similar check in a bar (R. 33–35, 67–68) and had given another man several similar checks to cash (R. 43–51). Petitioner denied having or cashing the checks (R. 95).

In submitting the case to the jury, the judge said (R. 105):

> * * * I am not going to read the Information to you because it is short. It contains * * * the charge on which this defendant is being tried, and you are going to be permitted to take it to your jury room, and you can read it and understand it better perhaps in that manner than if you just heard it read.

The judge pointed out that the information was not evidence of guilt and not to be considered as such. He stated that it was based on a statute providing that "Whoever with lawful [sic] or fraudulent intent transports in interstate or foreign commerce any falsely made forged altered or counterfeit securities knowing the same to have been falsely made, forged or counterfeited" (R. 106).

After instruction on burden of proof and credibility, the judge said (R. 107):

> The defendant has pleaded not guilty. This puts the burden of proving the charge and each and every material element of the charge in the Information upon the Government and this burden never shifts to the defendant. You can-

> not find him guilty unless from the evidence you believe him guilty of the offense charged in the Information beyond a reasonable doubt.

The judge then charged on reasonable doubt and the presumption of innocence (R. 108).

Defense counsel made no objection to the charge, requesting only that the jury be told they were free to ask for the exhibits. This was done (R. 110).

The Court of Appeals affirmed the conviction against contentions that the evidence was insufficient and that it was error to permit proof of cashing of similar checks (Pet. 11–13). On a motion for leave to file a second petition for rehearing, which was denied (see fn. 1, *supra*, p. 1), new counsel raised issues as to the sufficiency of the instructions.

ARGUMENT

The sole issue raised in the petition is the sufficiency of the instructions, which were not challenged in either court below until the motion for leave to file a second petition for rehearing after affirmance by the Court of Appeals. The objection comes much too late. Rule 30, F.R. Crim. P. The instructions adequately enough presented the necessary issues to the jury. As the judge pointed out, the information, a copy of which was given to the jury, clearly stated the elements of the simple charge. The court instructed the jury that each element had to be proved beyond a reasonable doubt and he gave correct instructions as to reasonable doubt and the presumption of innocence. The necessity of finding unlawful intent appeared, not only from the charges of the information, but from the judge's reading of the statute. The slip of the

tongue when the judge read the statute as providing for "lawful" intent (see Pet. 5–6; *supra*, p. 3) was obviously not misleading since it was coupled with the word "fraudulent" and since the judge also read that part of the statute which provides that the defendant must know the security to have been falsely made, forged or counterfeit (R. 106). There is thus no occasion for this Court to review this conviction, which was amply supported by the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

FEBRUARY 1960.

U. S. GOVERNMENT PRINTING OFFICE 1960